UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CBCA 1310 GRANTED IN PART;
CBCA 1530 DENIED: March 26, 2010

CBCA 1310, 1530

SPRINGCAR COMPANY, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Robert C. MacKichan of Holland & Knight LLP, Washington, DC; and William M. Pannier of Holland & Knight LLP, Los Angeles, CA, counsel for Appellant.

Lesley M. Busch, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **STERN**, and **HYATT**.

SOMERS, Board Judge.

Appellant, Springcar Company, LLC (Springcar), asserts that it is entitled to relief resulting from various alleged changes under a lease agreement with the General Services Administration (GSA or the Government). In its first claim, submitted on April 30, 2008, Springcar seeks compensation for increased electrical costs resulting from the transfer of leased space from one heating, ventilation, and air conditioning (HVAC) system to another. Springcar asserts that it is entitled under the terms of the lease to three separate elements of compensation: (1) $2,512,403 for required overtime HVAC from October 14, 2005, through April 30, 2008, plus interest; (2) $450,667 for required overtime HVAC from May 1, 2008,

through October 13, 2008; and (3) an upward adjustment in the monthly rent for the remainder of the lease commencing on October 14, 2008, through October 13, 2018, in the amount of $82,307.50. In its second claim, submitted on February 9, 2009, Springcar contends that the Government imposed numerous changes to the leased premises, which resulted in increased electrical costs. Springcar seeks declaratory relief and/or up to $698,860 in equitable adjustments and damages.

The Government denied the first claim, docketed as CBCA 1310, but acknowledged that Springcar would be entitled to some relief for any extra operating expenses arising from the transfer of leased space from the general HVAC system to the dedicated twenty-four-hour HVAC system. However, it disputes that Springcar is entitled to the amount of reimbursement outlined in its claim. The second claim was docketed as CBCA 1530 on a deemed denied basis. The Government disputes that the Government changed any of the terms of the lease, or that Springcar is entitled to any additional expenses resulting from the alleged changes.

We hold that Springcar is entitled to recovery for additional electrical costs resulting from the transfer of leased space from the general HVAC system to the dedicated twenty-four-hour system. For reasons explained below, we conclude that the cost for the twenty-four-hour operation for the additional 8434 square feet is approximately $2.17 per square foot per year for that square footage. GSA shall pay to Springcar a one-time payment of $101,459.90 plus interest, as calculated in accordance with the Contract Disputes Act of 1978, 41 U.S.C. § 611 (2006), from the date on which GSA received Springcar's first certified claim (April 30, 2008) until the date of payment. In addition, the annual rent shall be increased by the amount of $18,301.78 per year effective May 1, 2010. We deny the remainder of appellant's claims.

Findings of Fact

Background

GSA issued a solicitation for offers (SFO) to lease space to house a Federal Bureau of Investigation (FBI) field office with a parking garage in Springfield, Illinois.

Following discussions with GSA's contracting officer, Fedcar Company, Ltd. (Fedcar) proposed to construct an all-electric building. As part of its best and final offer submission, Fedcar completed an annual cost statement and a rent breakdown worksheet, known as standard form (SF) 1217. Under the lease, applicable costs listed on the SF 1217 are used

to determine the base rate for operating cost adjustments.[1] The worksheet included the total base year electrical budget proposed by Fedcar, $199,950, with $51,600 for heating and $148,350 for air conditioning, lights, and power, including elevators. Electricity is included among the operating costs, and, at the time, Springfield, Illinois, had the lowest electrical utility costs in the country.

Beginning with the second year of the lease and each year thereafter, rent paid by the Government would be adjusted. The amount of adjustment would be determined by multiplying the base rate by the percent of change in the annual Consumer Price Index (CPI), with adjustments to be effective on October 14 of each year. The lessor bore the risk that the utility costs would exceed the CPI index adjustment.

GSA awarded the lease to Fedcar on April 23, 2004.[2] The lease term commenced on October 14, 2005. The parties agree that the cost of electrical utilities in Springfield, Illinois, increased after award of the lease.

Lease Requirements

Pursuant to the lease, all utilities, services, and maintenance would be included in the monthly rental amount. The lease establishes the operating cost base at the agreed rate of $9.59 per usable square foot for the purposes of the base operating cost adjustment.

The lease called for three separate electrical distribution systems, identified as "normal," "shielded," and "essential." The normal distribution is used to supply most of the lighting, building HVAC, and general wall outlets. The shielded distribution system supports FBI office data processing equipment with certain required loads. The essential distribution system is used to support critical communications, data processing, and related HVAC and lighting equipment. All three electrical distribution systems feed into a single electrical meter.

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[1] Operating costs include costs for "cleaning services, supplies, materials, maintenance, trash removal, landscaping, water, sewer charges, heating, electricity, and certain administrative expenses attributable to occupancy." Appeal File, Exhibit 1 at 29.

[2] On that same date, the parties supplemented the lease agreement to assign the lease to Springcar Company, LLC (Springcar or appellant). Springcar, the assignee, is an affiliated entity of Fedcar, the assignor. Fedcar is solely owned by Carnegie Management and Development Corporation (CMDC). CMDC is the manager of Springcar. Joint Stipulation ¶¶ 2-5.

The lease required the building to have two independent electric HVAC systems. These HVAC systems share the same electrical meter as the three electrical distribution systems. The first HVAC system is a non-redundant general building HVAC system and operates from 7 a.m. to 6 p.m. during normal business days. Any use of the general building HVAC system outside the hours of normal use falls under paragraph 7.3 of the lease, Overtime Usage. Only the contracting officer or the GSA building manager could order heating or cooling on an overtime basis, either orally or, in the event the cost of the services would exceed $2000, in writing. Appeal File, Exhibit 1 at 73. The Government would pay an additional charge of $55 per hour per floor for use of the general HVAC system outside normal working hours.

The second HVAC system has two functions. The first one supplies HVAC twenty-four hours per day, seven days per week, to those areas on the dedicated twenty-four-hour HVAC system. The second function is to provide twenty-four-hour HVAC on demand. The on-demand service allowed the FBI personnel to walk into the building and press a button to activate the system without waiting for a building manager to turn on the HVAC system. The on-demand service system covered specific rooms identified in the lease. Pursuant to the lease agreement, all electricity costs incurred by the continuous or on-demand operation of the twenty-four-hour HVAC system must be included in the lease rate.

The lease requires the lessor to provide a micro-processor-based building automation system (BAS) that is capable of integrating into a single operator workstation such things as the controls, alarms, and monitoring of the HVAC system (both the general building HVAC system and the dedicated twenty-four-hour HVAC system), lighting, emergency diesel generator, and elevators, to the extent feasible. This BAS is run by two computers, one master computer which runs the overall system, with the second computer as a remote station. The lease required the BAS to be programmed to provide optimum energy-saving features.[3] Occupancy sensors and/or scheduling controls through the BAS reduced the hours that the lights would be on when the space was unoccupied.

The lease requires that all interior parking lighting be provided as part of the building shell costs. Parking must have twenty-four-hour access and egress seven days a week,

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[3] The master computer system is protected by a password system. No change can be made to the BAS schedules without access to the master computer. The FBI personnel on site could not adjust the settings on the master computer because they do not have the password.

including holidays, and parking garage lighting must be sufficient to accommodate security monitoring (i.e., closed circuit television cameras).

The lease provided a process for notifying the contracting officer of changes to the contract requirements. It states as follows:

> In the event of change orders, the Lessor agrees to the following procedures:
>
> (1) All requests for change orders shall be in writing from the General Services Administration (GSA) Contracting Officer or a GSA Contracting Officer's Representative (COR).
>
> (2) Price quotations shall be supplied to the requestor within one week of the written request.
>
> (3) Notification of change orders status shall be given within three weeks of the date the price quotation was received.
>
> (4) Without written approval from the GSA Contracting Officer or GSA COR, no change order should be processed. If a change order is processed without written consent of the GSA Contracting Officer or GSA COR, the Lessor shall bear full financial responsibility for the change order and compliance to the terms of the Solicitation for Offers.

Appeal File, Exhibit 1. The lease also incorporates General Services Administration Acquisition Manual 552.270-14 Changes (SEP 1999) (Variation):

> (a) The Contracting Officer may at any time, by written order, make changes within the general scope of this lease in any one or more of the following:
>
> (1) Specifications (including drawings and designs);
> (2) Work or services;
> (3) Facilities or space layout: or
> (4) Amount of space, provided the Lessor consents to the change.

> (b) If any change causes an increase or decrease in Lessor's cost of or the time required for performance under this lease, whether or not changed by the order, the Contracting Officer shall modify this lease to provide for one or more of the following:
>
> > (1) A modification of the delivery date;
> > (2) An equitable adjustment in the rental rate;
> > (3) A lump sum equitable adjustment; or
> > (4) An equitable adjustment of the annual operating costs per ANSI/BOMA [American National Standards Institute/Building Owners and Managers Association] Office Area square foot specified in this lease.
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> (c) The Lessor shall assert its right to an adjustment under this clause within 30 days from the date of receipt of the change order and shall submit a proposal for adjustment. Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the [L]essor from proceeding with the change as directed.
>
> (d) Absent such written change order, the Government shall not be liable to the Lessor under this clause.

Id.

Transfer of Space to Dedicated Twenty-Four-Hour HVAC System

During construction, GSA directed appellant to transfer approximately 8434 usable square feet of space from the general HVAC system to the dedicated twenty-four-hour HVAC system. On June 8, 2007, GSA and Springcar executed supplemental lease agreement (SLA) 8, which compensated Springcar $82,256.28 for the construction costs associated with this transfer to the dedicated twenty-four-hour HVAC system. The parties could not agree if or how GSA should reimburse appellant for additional electrical costs resulting from the change. Appeal File, Exhibit 13.

In an effort to adjust the operating cost base to account for the electrical costs associated with moving 8434 square feet to the dedicated twenty-four-hour HVAC system, the contracting officer drafted a modification to the lease agreement, which stated:

> At the end of the first year of occupancy, Springcar Company, LLC, may submit original bills for the electrical and heating services for the first 12 months of occupancy at the leased premises. Using that data, GSA will adjust the cost of the services and utilities up or down (whichever is applicable). A separate supplemental lease agreement will be issued by the Contracting Officer to establish the new cost of service and utility rate for the remainder of the contract. If the original bills are not submitted by November 15, 2006, no adjustments will be made to the rate.

Appeal File, Exhibit 13. Springcar did not sign the modification as written. Instead, Springcar added the following to the modification:

> Due to the expansion of the areas from those designated in the SFO [solicitation for offers] that require 24 hour electrical usage, and the increased requirement for electricity to serve those 24 hour areas, an additional sum of $5,282.50 will be added to the monthly rent payment.

Id. With that change, Springcar signed the modification and returned it to the contracting officer. However, the contracting officer did not agree with the changes and did not execute SLA 7 as amended. *Id*.

In a letter dated December 5, 2005, Robert Berryhill, property manager for Springcar, notified the contracting officer that the total electrical usage at the leased premises greatly exceeded the costs anticipated in the original budget. Mr. Berryhill believed that the transfer of space to the dedicated twenty-four-hour HVAC system caused the increased expense. He anticipated that the change would also result in increased repair and maintenance costs to the electrical system as well.

At various times in 2006, the parties tried to agree on a method to be used to calculate increased operating costs for the electrical costs associated with the transfer of space from the general HVAC system to the dedicated twenty-four-hour HVAC system. Meanwhile, the utility bills showed that the total costs of utilities paid by Springcar for 2006, 2007, and 2008 were $331,812.22, $400,618.94, and $431,717.87, respectively.

In February 2008, a real estate specialist from GSA proposed a method for calculating the increased operating costs resulting from the transfer of space to the twenty-four-hour HVAC system. The specialist stated:

> The cost of construction for additional 24 hour rooms was resolved in June of last year with SLA No. 8 documenting 4,629 ANSI BOMA SF [square feet] added to the 24 hour system. Additionally, 3,805 ANSI BOMA SF were added to the 24 hour [system] by construction modifications subsequent to the Lease execution, with no increase in operating cost. I have calculated the increase in operating cost due to the addition of the combined square footage of 8,434 SF to the 24 hour system. This cost is $0.28/SF/Yr. based on the 65,250 square footage of the building. The calculated cost of the 24 hour operation of the additional 8,434 SF square feet is approximately $2.17/SF/Yr. for that square footage.

Appeal File, Exhibit 16. The specialist prepared SLA 9 to provide for a one-time payment of $64,520.60 for the cost to operate the additional space through April 2008, and SLA 10 to provide for a permanent increase in the annual rent and in the operating rent effective May 1, 2008. *Id*.

On April 30, 2008, appellant submitted a request for an equitable adjustment for the increase in operating expenses resulting from the transfer of space from the regular system to the twenty-four-hour system. Appellant calculated its increased costs by using the fixed rate of $55 per hour per floor for overtime HVAC charges outside normal working hours set forth in the lease. This paragraph states:

> It is mutually agreed there will be a charge of $55.00 per hour per floor for HVAC beyond normal working hours of 7:00 AM to 6:00 PM, except Saturdays, Sundays, and Federal holidays, except where 24 hour HVAC is to be provided.

Appeal File, Exhibit 1. Relying upon the assumption that this paragraph should apply to the transferred space, appellant estimated that it should be paid $2,512,403.39 for required overtime HVAC from October 14, 2005, through April 30, 2008, plus interest. In addition, it sought an upward adjustment for required overtime HVAC from May 1, 2008, through October 13, 2008, of $450,666.61. Finally, it sought an upward adjustment for the remainder of the lease term commencing October 14, 2008, through October 13, 2018, in the amount of $82,307.50 per year.

The contracting officer rejected appellant's assertion that any increase in operating costs due to additional rooms being added to the dedicated twenty-four-hour HVAC system should be dictated by the terms of paragraph 16. The contracting officer noted that the

supplemental lease agreements added the additional rooms to the twenty-four-hour HVAC system on a permanent basis. As a result, the additional space should be considered to be the same as the space previously allocated to the dedicated twenty-four-hour HVAC system. The payment for the operating costs associated with the dedicated twenty-four-hour system is governed by SFO paragraph 4.5A.4, which states that ". . . [a]ll energy costs incurred by the operation of the 24 hour HVAC system shall be incorporated in the lease rate." With that premise, the contracting officer looked at the total annual costs of utilities paid by appellant over the course of one year, taking the dollars per square foot of the total utilities paid, and prorating the number to cover space (extra square feet) and usage (additional time for the additional square feet outside of normal hours) not already included in the lease rental rate. The contracting officer concluded that the total amount due would be $77,440.67 (plus interest) to cover the additional utilities up to June 31, 2008. In addition, the operating cost base going into the future years would be $27,657.38 annually.

Appellant appealed this final decision, docketed as CBCA 1310. During the course of negotiations following the first appeal, the parties uncovered a complicating factor, which is detailed in the next section and ultimately led to appellant's second request for equitable adjustment.

Other Alleged Changes

Shortly after it moved into the building, the FBI told the contracting officer that malfunctioning occupancy sensors caused the lights and HVAC system to shut off in some areas of the building during the middle of the day. As a result of this complaint, the contracting officer arranged a meeting on October 21, 2005, for FBI representatives and the subcontractor who originally installed and set up the BAS system, Premium Mechanical and Automation, Inc. (Premium or the subcontractor), to discuss the issue. The contracting officer did not attend the meeting. Appellant's representative later testified that no GSA representative attended the meeting. Transcript 137-38.

After the meeting, the subcontractor adjusted the BAS settings so that areas designated to be supplied twenty-four-hour HVAC on demand were actually supplied twenty-four-hour HVAC on a continuous basis. Neither GSA nor appellant knew that the technician had made these changes until January 2009, when a log of the BAS activity confirmed that the changes had been made and when.

On February 9, 2009, appellant filed its second request for equitable adjustment. It seeks reimbursement for additional electrical expenses resulting from several alleged government-imposed changes, some of which appellant contends it discovered through site visits in January 2009. It states that the Government directed that the lighting in the parking

garage remain on at all times, that the Government used computer equipment in excess of that specified in the solicitation for requirements, and that the Government caused on-demand twenty-four-hour HVAC to be supplied with continuous twenty-four-hour service. Appellant seeks declaratory relief, reformation of the lease, and the total amount of the cost impact resulting from these alleged changes.

After appellant submitted the second claim, but before trial, in late March or early April 2009, the BAS failed. Appellant replaced the BAS system and reset the system in accordance with the lease agreement. After the BAS system setting had been reset, the cost of the utility bills decreased significantly.

The electrical meter reading on March 18, 2009, was the last reading to reflect just the settings of the BAS that had been programmed on October 21, 2005. This reading covered thirty days and measured 352,512 kilowatt hours used at a total cost of $33,146.63.

In April 2009, about half-way through the electricity billing cycle, the settings of the replacement BAS were established. Thus, the electrical meter reading on April 21, 2009, reflected a blend of the former and current settings of the BAS. That April reading covered thirty-four days and measured 333,504 kilowatt hours (9809 kilowatt hours per day) at a total cost of $31,873.53.

Thereafter, only the settings of the replacement BAS are reflected in the electrical meter readings. The electrical meter reading on May 19, 2009, covered twenty-eight days and measured 235,008 kilowatt hours used (8393 kilowatt hours per day) at a total cost of $25,032.58. The electrical meter reading on June 17, 2009, covered twenty-nine days and measured 257,472 kilowatt hours used (8878 kilowatt hours per day) at a total cost of $31,044.25.[4]

Appellant's Expert

Appellant retained Matthew Murphy, a mechanical engineer and licensed professional engineer (PE) with the firm of Westlake Reed Leskosky (WRL) of Cleveland, Ohio, to assess the energy consumption and electrical costs at the leased premises to determine whether such usage and costs were consistent with the lease requirements. Mr. Murphy used a computer program to simulate the operation of the energy-consuming portions of a building.

[4] Appellant provided these calculations in Appellant's Post-Trial Brief at pages 11-12. Appellant notes that the charges are based on the higher summer rate. Presumably, the utility bills for the winter months would be even lower.

Mr. Murphy looked at two scenarios. The first scenario represented the premises in its actual operating condition calibrated to the actual electrical bills. The second scenario is based on what was reasonably expected from the SFO. Because Mr. Murphy had electrical bills for 2006, 2007, and 2008, he ran the energy model for each of those years. Appeal File, Exhibit 18; Transcript at 217.

Based upon his analysis, appellant's expert concluded that the HVAC operating schedule was the largest factor contributing to the electrical costs at the premises. He concluded that the costs incurred by appellant because of the alleged government changes were approximately $563,230 through 2008. Appeal File, Exhibit 18. It did not appear that the expert analyzed the impact of the changed BAS setting or adjusted the calculations to take that into account.

In response to appellant's expert witness report, respondent has noted that the report is based on an inaccurate building size and overestimates the occupancy of the building during other than normal business hours. Also, the report failed to examine the change in equipment loading and assumes that the FBI used the same amount of computers throughout the entire lease term.

Respondent's Expert

Respondent retained Jeffrey Newcomb, a mechanical engineer and licensed PE with the firm of KJWW in Rock Island, Illinois, to evaluate the energy impact resulting from the alleged government-imposed changes to the lease agreement requirements. Mr. Newcomb provided two reports. The first report analyzed a single issue presented by appellant's first claim: the increased operating costs associated with transferring 8434 square feet from the standard HVAC system to the dedicated twenty-four-hour HVAC system. The expert determined that the change resulted in an increase of $1034 per year. Joint Stipulation ¶ 64; Transcript at 546.

The second expert report, dated April 16, 2009, was written to respond to appellant's allegations that government changes caused additional energy consumption. Using an energy modeling software system that allows for an hourly simulation of all various energy uses within commercial buildings throughout an entire calendar year, the report found that the energy costs associated with the transfer of 8434 square feet to the dedicated twenty-four-hour HVAC system is $6494. In addition, the cost of servicing the on-demand areas would result in an increase of $3157. Appeal File, Exhibit 17.

Respondent's expert opined that the largest issue causing increased electrical usage was the improper function of the controls, including supply fan speed, terminal air box

setting problems, and ventilation control, which did not meet the requirements of the lease. The expert estimated the cost of the incorrect HVAC controls to be $104,316. The difference in maintenance cost based on the hours of the dedicated twenty-four-hour HVAC system was determined to be negligible, with a maximum increased value of $156 per year for the one roof-top unit, RTU-3, serving the twenty-four-hour spaces. Transcript at 497-98; Appeal File, Exhibit 17.

Appellant disagrees with respondent's expert reports, arguing that they are not accurate because the analysis failed to successfully compare the models with the actual utility bills.

Discussion

The parties agree that the Government transferred a certain amount of square feet from the general building HVAC system to the dedicated twenty-four-hour HVAC system after the initial award of the contract, but before the tenant moved into the building. In addition, the parties agree that the change had an impact upon the total electrical costs of the building.

The issue at hand is how much the lessor is entitled to receive as a result of that change. Appellant asserts that it had estimated its total base year electrical cost to be $199,950 -- with $51,600 budgeted for heating and $148,350 budgeted for air conditioning, lights, and power, including elevators. However, since the tenant took occupancy, appellant contends that it has been burdened with excessive electrical and related operating costs as a result of actual and constructive changes allegedly imposed by the Government. Appellant maintains that in addition to transferring square footage to the dedicated twenty-four-hour HVAC system, by installing and using more electricity through more computers than contemplated in the SFO, by supplying continuous twenty-four-hour HVAC to areas only requiring twenty-four-hour HVAC on demand, and by running the lighting in the parking garage continuously, the Government has changed the contract and appellant is entitled to compensation for these changes.

The Government disagrees. The Government believes that appellant's calculation of the cost impact resulting from transferring the square footage from the general HVAC system to the dedicated twenty-four-hour HVAC is inaccurate based upon respondent's expert's analysis. The Government disagrees that the lease limits the amount of electrical equipment that can be installed and used on the premises and states that the contracting officer never had a detailed discussion with appellant, either before or after the award of the lease, concerning computer or other equipment loads. In any event, the Government notes, the FBI did not install the extra computer equipment at issue until later in 2008. Finally, the Government

argues that it never requested that the parking garage be supplied with lighting continuously. The Government claims that its representatives suggested on numerous occasions that appellant operate the parking garage lights by reducing the lighting during unoccupied periods through using cost efficient measures. Appellant did not notify the contracting officer of any of these alleged changes to the contract requirements, with the exception of the impact resulting from the transfer of space, prior to filing its appeals.

Appellant bears the burden of proving the elements of the claim necessary to establish recovery. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767-68 (Fed. Cir. 1987).

First Claim (CBCA 1310)

As noted above, appellant's first claim for additional electrical expenses resulting from the change of square footage from the general HVAC system to the dedicated twenty-four-hour HVAC system is based upon an actual written change. Appellant received compensation for the actual construction costs relating to this change -- the parties agree that the issue remaining on the first claim is the equitable amount to be paid, i.e., the compensation for the additional electrical costs resulting from the change.

The payment for the operating costs associated with the dedicated twenty-four-hour system is governed by SFO paragraph 4.5A.4, which states that ". . . [a]ll energy costs incurred by the operation of the 24 hour HVAC system shall be incorporated in the lease rate." The actual square footage listed in SLA 2, signed by both parties, indicates that the total square footage for the building is 71,331 rentable square feet of office and related space, yielding 65,250 usable square feet of office space.

The Government ordered the transfer of 8434 usable square feet from the general HVAC system to the twenty-four-hour HVAC system. This change resulted in an increase in the amount of space that should be incorporated in the lease rate.

The transferred square footage does not fall under the overtime provisions of the lease, because it is not supplied by the general HVAC system. Since appellant calculated its operating costs based upon an assumption that a certain amount of space would be covered by the twenty-four-hour HVAC system, and that amount of space increased, appellant should be compensated for additional operating costs associated with this additional space.

The expert witnesses for both sides have presented various methods for how to calculate this additional compensation. Appellant's expert failed to adequately account for the changed BAS settings or the fact that additional computers were not added until later in

the lease. The report relied upon assumptions as to occupancy levels and usage that were not consistent with the actual use of the building.

Respondent's expert report on this issue finds that most of the expenses resulted from the improper functioning of the HVAC system controls. Although the analysis makes sense, and may ultimately be true, respondent failed to present evidence sufficient to support the expert's ultimate premise that the HVAC controls were functioning improperly.

The best analysis is one similar to that performed by the GSA real estate specialist. Appeal File, Exhibit 16 at 16-1. Using the original operating expenses detailed in the lease, the specialist calculated the increase in electrical costs based on the transfer of 8434 square feet from the general HVAC system to the twenty-four-hour HVAC system. The specialist calculated the cost of adding 8434 square feet to the twenty-four-hour HVAC system to be approximately $2.17 per square foot per year. Using this formula, the specialist calculated that Springcar would be entitled to a one-time payment of $64,856.31 for the period of October 14, 2004, to April 30, 2008. We find that this calculation provides the best method of calculating the compensation due as a result of transfer of the space.

Under this formula, correcting for minor errors in the specialist's calculations, Springcar is entitled to a one-time payment of $64,856.31 for the period of October 14, 2004, to April 30, 2008. For the two-year period from April 30, 2008, to April 30, 2010, we add $36,603.56. Therefore, Springcar is entitled to a one-time payment of $101,459.90. From May 1, 2010, until the end of the lease, Springcar is entitled to an increase to the annual rent of $18,301.78 per year.

Claim 2 (CBCA 1530)

Appellant contends that the Government ordered certain changes that increased its costs under the contract. First, as noted above, it asserts that the Government ordered that the BAS settings be changed in October 2005, which resulted in areas that had been designated as twenty-four-hour HVAC on demand to be supplied twenty-four-hour HVAC on a continuous basis. This change, says appellant, resulted in increased electrical expenses. In addition, appellant states that the Government directed that the lighting in the parking garage remain on at all times and that the Government used computers in excess of the amounts specified in the SFO.

We find that appellant has failed to prove by a preponderance of the evidence that the Government ordered any of these changes. No witness could testify concerning who actually ordered that the changes be made as a result of the October 2005 meeting. The only evidence presented is that problems had been identified with the occupancy sensors, a meeting

occurred, and a subcontractor made changes to the BAS settings as a result of the meeting. Nothing established that the contracting officer, or the contracting officer's representative, ordered that the changes to the BAS setting should be made. In fact, the evidence was uncontroverted that GSA did not become aware of the changes until a log of BAS activity obtained in January 2009 revealed that the changes had occurred.

On the other issues, as well, appellant has failed to establish that the contracting officer or the contracting officer's representative ordered the changes. On the issue of the parking lights, it appears that the FBI notified appellant that the lights appeared to be on continuously, and indicated a willingness to let appellant take actions to limit the lighting period by using a sensor system, for example. Appellant did not present any satisfactory evidence to show that the parking lot lights had any impact, significant or otherwise, on its operating expenses. As to the computers, appellant has failed to show that the amount of computers exceeded any limitations set forth in the SFO, nor did appellant present sufficient evidence to show that the computers increased its operating expenses.

Based upon appellant's failure to meet its burden of proof on these issues, we reject the second claim and deny the appeal.

Decision

CBCA 1310 is **GRANTED IN PART**; CBCA 1530 is **DENIED**. GSA shall pay to Springcar a one-time payment of $101,459.90 plus interest, as calculated in accordance with the Contract Disputes Act of 1978, 41 U.S.C. § 611, from the date on which GSA received Springcar's first certified claim (April 30, 2008) until the date of payment. In addition, the annual rent shall be increased by the amount of $18,301.78 per year effective May 1, 2010.

JERI KAYLENE SOMERS
Board Judge

We concur:

JAMES L. STERN
Board Judge

CATHERINE B. HYATT
Board Judge